**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

JOSE TRUJILLO, individually and on behalf of all others similarly situated, Plaintiff, v. APPLE COMPUTER, INC., a California Corporation, and AT&T MOBILITY LLC, a Georgia Corporation, Defendants.	No. 07 CV 04946 Judge Kennelly Mag. Judge Ashman

DEFENDANT AT&T MOBILITY LLC'S RESPONSE TO PLAINTIFF'S MOTION FOR LEAVE TO FILE NOTICE OF SUPPLEMENTAL AUTHORITY AND MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITY IN SUPPORT OF ITS MOTION TO COMPEL ARBITRATION AND DISMISS ACTION

Plaintiff Jose Trujillo has requested leave to submit as supplemental authority an order denying ATTM's motion to compel arbitration in a case in federal district court in California. *Stiener v. Apple Computer, Inc.*, 2008 WL 691720 (N.D. Cal. Mar. 12, 2008), *appeal pending*, No. 08-15612 (9th Cir.). Although ATTM has no objection to the Court's consideration of the *Stiener* order, that order has little bearing here. The court in *Stiener* evaluated ATTM's arbitration provision under ***California*** law. Under the court's view of California law—which we ubmit is mistaken—an arbitration provision requiring individual adjudication is unconscionable unless it "functions as well as a class action would" in ensuring "that *all*" putative class members "would recover more, on average," in individual arbitration than in a class action. *Id.* at *12, *13 (emphasis in original). By contrast, the Illinois Supreme Court has held that "[i]t is not unconscionable or even unethical for a business to attempt to limit its exposure to class

Dockets.Justia.com

arbitration or litigation" (857 N.E.2d at 278) so long as "the agreement containing the waiver is not burdened by other features limiting the ability of the plaintiff to obtain a remedy for the particular claim being asserted in a cost-effective manner." *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 274, 278 (Ill. 2006). As we have explained, ATTM's arbitration provision is fully enforceable under *Kinkel*. Arb. Mem. (Dkt. No. 37) 8–10; Reply Mem. (Dkt. No. 77) 6–13. To the extent that other states' views on unconscionability are relevant here, another federal district court has upheld ATTM's arbitration provision under Arkansas law. *See Davidson v. Cingular Wireless LLC*, 2007 WL 896349 (E.D. Ark. Mar. 23, 2007).

It is true that the *Stiener* court held that the FAA, as interpreted by the Ninth Circuit, does not preclude California from deeming arbitration provisions requiring individual adjudication to be unconscionable. 2008 WL 691720, at *16–*17. No other circuit, however, shares the Ninth Circuit's view. For example, Judge Buckwalter of the Eastern District of Pennsylvania recently held that, under the Third Circuit's interpretation of the FAA in *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007), the FAA does preempt Pennsylvania law deeming such arbitration provisions to be unconscionable. *Weinstein v. AT&T Mobility Corp.*, 2008 WL 1914754, at *5 (E.D. Pa. May 1, 2008) (attached). ATTM respectfully requests leave to submit *Weinstein* as additional authority in support of its motion to compel arbitration.

Dated: May 5, 2008

Respectfully submitted,

/s Sarah E. Reynolds

Victoria Collado (#6204015)
Sarah E. Reynolds (#6287186)

MAYER BROWN LLP
71 South Wacker Drive
Chicago, IL 60606
Tel: (312) 782-0600
Fax: (312) 263-7711

Evan M. Tager (*pro hac vice*)
Archis A. Parasharami (*pro hac vice*)
Kevin Ranlett (*pro hac vice*)
MAYER BROWN LLP
1909 K Street, N.W.
Washington, DC 20006
Tel: (202) 263-3000
Fax: (202) 263-5000

Attorneys for Defendant AT&T Mobility LLC

CERTIFICATE OF SERVICE

I, Sarah E. Reynolds, an attorney, I hereby certify that on May 5, 2008, I electronically filed the foregoing **DEFENDANT AT&T MOBILITY LLC'S RESPONSE TO PLAINTIFF'S MOTION FOR LEAVE TO FILE NOTICE OF SUPPLEMENTAL AUTHORITY AND MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITY IN SUPPORT OF ITS MOTION TO COMPEL ARBITRATION AND DISMISS ACTION** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

James R. Rowe
THE LAW FIRM OF JAMES R. ROWE & ASSOCIATES
205 Wwest Randolph, Suite 1430
Chicago, IL 60603
(312) 345-1357
rowelegal@gmail.com

Larry D. Drury
LARRY D. DRURY, LTD.
205 West Randolph, Suite 1430
Chicago, IL 60603
(312) 346-7950
ldrurylaw@aol.com

Patrick T. Stanton
SCHWARTZ COOPER CHARTERED
180 North LaSalle Street, Suite 2700
Chicago, Illinois 60601
pstanton@scgk.com

Penelope A. Preovolos
Johanna W. Roberts
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105
ppreovolos@mofo.com

Respectfully submitted,

/s/Sarah E. Reynolds

Dated: May 5, 2008

Attorney for Defendant AT&T Mobility LLC